IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 19TH DECEMBER 2007 / 28TH AGRAHAYANA 1929

RFA.No. 131 of 2004(B)

OS.40/2002 of ADL.SUB COURT, THALASSERY
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APPELLANT/PLAINTIFF:

V.C. YOUSUFF, S/O. AHAMEDKUTTY,
AGED 66 YEARS, RESIDING AT SHALIMAR,
P.O. KAKKAD, KANNUR-5.

BY ADV. SRI.C.KHALID
SRI.N.GOPINATHA PANICKER
SRI.P.VISWAMBARAN
SRI.R.O.MUHAMED SHEMEEM
SRI.T.P.SAJID

RESPONDENTS: DEFENDANTS:
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1. I.K.C. ABDURAHIMAN HAJI,
FATHER'S NAME NOT KNOWN, AGED 69 YEARS,
CONTRACTOR, RESIDING AT SYNEST, THANA, KANNUR.

2. K.V. RAMAACHANDRAN, S/O. RAMAN NAIR,
AGED 50 YEARS, CONTRACTOR, RESIDING AT
AYODHYA, P.O. RAMANTHALI.

BY ADV. SRI.M.RAMESH CHANDER
SRI.GRASHIOUS KURIAKOSE
SRI.K.C.SANTHOSHKUMAR

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 4/12/2007, ALONG WITH RFA NO. 144 OF 2004 THE COURT ON 19/12/2007 DELIVERED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN,JJ.

R.F.A.Nos.131 & 144 of 2004

Dated 19th December, 2007.

JUDGMENT

Mohanan, J.

The above two appeals arise out of a common judgment dated 5-4-2003 in O.S.Nos.2/2000 and 40/2002 on the file of the Addl.Subordinate Judge, Thalassery. In both these appeals, the appellant is one and the same person. Appellant is the plaintiff in O.S.No.40 of 2002 and defendant in O.S.No. 2 of 2000. R.F.A.No.131 of 2004 arises from the judgment and decree in O.S.No.40 of 2002 and R.F.A.No.144/2004 arises out of O.S.No.2/2000. Since the challenge in both these appeals is against the common judgment of the court below and the parties are the same, the appeal were heard together and being disposed of by this common judgment.

R.F.A.No.144/2004:

The appellant in this appeal is the defendant in O.S. No.2/2000 and the respondent herein is the plaintiff therein. In O.S.No.2/2000, the plaint averment is that both the plaintiff as well as the defendant are contractors and they used to execute works for Public works Department. According to the

plaintiff, the tender submitted by the defendant as per the agreements was accepted by the Executive Engineer, Irrigation Department, Thalassery and the works were to be executed at Kasaragod which was then under the Irrigation Division ,Thalassery. The specific case of the plaintiff is that the works thus obtained by the defendant was entrusted with the plaintiff for execution as per Ext.A14 agreement dated 11-2-97 which was executed at Kannur in the presence of witnesses and two copies of the agreement were prepared and each of them was kept with the plaintiff as well as the defendant. The agreement contains the terms and conditions which are bound by the parties, viz., the plaintiff and the defendant. According to the plaintiff, as per the stipulations contained in the agreement, the plaintiff has to complete the work within the time frame and agreed upon by the defendant with the department. Another specific condition in the agreement is that the plaintiff has to complete the work by spending his own money and on the receipt of money

from the department, for each work, the defendant has to pay money to the plaintiff for the work executed by him after deducting an amount of Rs.15,000/- in respect of each work. As per the agreement between the plaintiff and the defendant, this amount of Rs.15,000/- is the profit that the defendant will get from the work executed by the plaintiff. It was specifically covenanted that the defendant was liable to pay the money and also be liable for all losses suffered by the plaintiff, if the defendant failed to pay the amount obtained by him to the plaintiff after deduction of Rs.15,000/- as above. The plaintiff says that the work entrusted with the plaintiff was faithfully and in good condition executed by him, but the defendant did not honour his commitment and liability under the terms of the agreement. It has been specifically averred in the plaint that an amount of Rs.41,32,325/- was received by the defendant from the department towards the work entrusted and executed and completed by the plaintiff. However, out of this amount, the defendant is entitled to

get Rs.1,95,000/- at the rate of Rs.15,000/- for each work. Thus according to the plaintiff, after deducting Rs.1,95,000/- out of the total amount, the defendant is liable to pay Rs.39,37,325/- to the plaintiff. According to the plaintiff, on 3-12-1999, the defendant had issued a cheque for Rs.10 lakhs in favour of the plaintiff which was encashed. Thus according to the plaintiff, the balance amount of Rs.29,37,325/- which is due to the plaintiff from the defendant. It is averred that though several demands were made, the defendant did not make any payment, which resulted in sending lawyer notice dated 16-12-1999 to the lawyer of the defendant. Thus the defendant received the notice on 17-12-1999, and reply was sent through Advocate, one Mr. P. Musthafa, containing false and unsustainable allegations and claim. The plaintiff has denied the claim that the defendant has paid Rs.2 lakhs to Abdul Rahman Haji, Rs.6 lakhs to Abdulla Moosa and Rs.21,29,782/- to Jebbar Haji. It is also averred in the plaint

that they have noting to do with this contract and the said two persons viz., I.K.C. Abdul Rahman Haji and Abdul Jabbar Haji are witnesses to the agreement between the plaintiff and defendant. The plaintiff has stated that he does not even know Abdulla Moosa. It is specifically stated that the defendant has no business to pay any amount on account of this contract in question to the above named persons and also stated that the plaintiff has no liability and he is not bound by any such payment if any made by the defendant to those persons. Thus the suit claim is for realization of Rs.29,37,325/- with interest at the rate of 18% per annum from the date of the suit till its realization.

2. Denying all the plaint allegations in the plaint, defendant filed a written statement. According to the defendant the suit is ill motivated. It is admitted that the defendant is a P.W.D. contractor and he used to obtain contract work and also specifically admitted that he had obtained the work mentioned in the plaint from the

Irrigation department, Thalassery. It is specifically stated that the defendant used to do the contract work jointly with one I.K.C. Abdul Rahman Haji and after completing the work, an amount used to be paid to the said person for settlement of account. According to the defendant, an agreement, which is the subject matter of this suit was executed by the defendant at the instance of the said Abdul Rahman Haji and according to the defendant, the plaintiff is only a name lender to the said Abdul Rahman Haji. It is also stated that the plaintiff has completed only part of the work entrusted to him. Agreement was written on four pages and the defendant had signed on all four pages. It is the specific case of the defendant that the agreement which produced in the court is not that agreement as his signature on page Nos. 2 and 3 are absent. It is also stated in the written statement that it was stipulated that defendant will be paid 15% of the profit for each item of work. Thus according to the defendant, in the agreement produced before the court it is

written as Rs.15,000/- instead of 15%. Hence, according to the defendant, the agreement produced in the court is a fraudulent and forged one. It is also averred that as the agreement is between the defendant and I.K.C. Abdul Rrahman Haji, he is a necessary party to the suit. Thus the defendant would say that the suit is filed at the behest of Abdul Rahman Haji. According to the defendant, he does not owe any amount to the plaintiff. It is stated that as per the contract, defendant has obtained Rs.41,32,335/- from the Department and 15% of profit in that amount is Rs.6,19,350/-. The remaining amount of Rs.35,12,485/- should be paid to Abdul Rahman Haji. According to the written statement, on his direction, the defendant has paid Rs.6 lakhs to one Abdulla Moosa and Rs.21,29,782/- to his son Abdul Jebbar and Rs.10 lakhs to the plaintiff. Thus according to the defendant he had already paid Rs.37,29,782/- and the plaintiff had accepted Rs.10 lakhs towards full satisfaction of his contractual claim. It is further stated that an excess

amount of Rs.2,17,297/- is with Abdul Rahman Haji and that amount is debited in the account of that person. Thus according to the defendant, an amount of Rs.10 lakhs is due to the defendant from Abdul Rahman Haji on account of the work done by him. All the above figures are arrived and shown on the basis of his contention that his profit is 15% out of all works.

3. On the basis of the pleadings of the parties concerned, the trial court has framed 5 issues in the above suit.

R.F.A. 131/2004:

The appellant in this appeal is the plaintiff in O.S.No.40/2002 which was filed against the two defendants viz., I.K.C.Abdul Rahiman Haji and K.V.Ramachandran who are the respondents in this appeal. Appellant herein who is the plaintiff in O.S.40/2002 is the defendant in O.S.2/2000. After filing O.S.2/2000 against the plaintiff herein, he had chosen to file the present suit against the plaintiff therein

who is shown as the second defendant in the suit. According to the averments in the plaint, the plaintiff and Ist defendant are contractors mainly undertaking government contracts and started their joint venture during the year 1993. According to the the plaint averments, the Ist defendant had undertook to pay the plaintiff a fixed profit of 15% of the bills as an incentive and consideration for rendering financial assistance, offering tenders and doing all other service for obtaining bills and cheques from the government department in his name. So according to the plaintiff, it was the practice that the plaintiff will present the cheque under intimation to the Ist defendant and collect the amount and hand over the same to the Ist defendant and the Ist defendant would defray the expenses of the contract and reserve the balance after deducting 15% of the bill due to the plaintiff as his share in the profit. Thus it is specifically stated that the plaintiff continued to advance amount to the Ist defendant ever since 16-1-1993 and this agreement continued for 6 years from 30-

7-1993 to 1-11-1999 without any interruption. It is the definite case of the plaintiff that the first cheque obtained by the plaintiff in relation to joint venture was for Rs.6,78,274/- which was on 30-7-1993. According to the plaintiff, the subsequent cheques in the name of the plaintiff were cashed from various banks and amounts were entrusted to the Ist defendant. It is also stated that the plaintiff used to collect part of his profits from the Ist defendant whenever he was in need of funds for his personal purposes. Regarding those transaction, clear account was maintained, thus the plaint averments continue. It also averred that the 2nd defendant is a close associate of the Ist defendant and the Ist defendant occasionally offered tenders in the name of 2nd defendant and got executed necessary documents and agreements. It is stated that in July 1986, plaintiff and defendants happened to participate in the auction of 13 items of contract work and thus tenders submitted by the plaintiff were confirmed by the department and these works have been part of the joint

venture. According to the plaintiff, after discussion, it was agreed that the work should be entrusted to the 2nd defendant for execution under the supervision of Ist defendant and 15% of the bills will be paid to the plaintiff by him on encashment of the cheque as before. However, according to the plaintiff, 2nd defendant failed to execute the work in time and the plaintiff has obtained extension of time on several occasion. But without completing the work, 2nd defendant abandoned the same and the Ist defendant had to undertake the work and to complete the same. Plaintiff submitted the bills in respect of the work. Thus according to the plaintiff, in the meanwhile on 11-2-1997 an agreement was reduced into writing regarding the share of profits due to the plaintiff. According to the plaintiff, Ist defendant was the custodian of accounts and records. It is also stated that on completion of the work plaintiff obtained the cheque from the department for Rs.41,32,325/- and the plaintiff requested the Ist defendant to settle the accounts in

accordance with the terms of the agreement. It is also stated that on this request the Ist defendant offended and declared that he was winding up the joint business. It is also the case of the plaintiff that Ist defendant insisted that the plaintiff should pay a sum of Rs.one lakh to the 2nd defendant in full settlement of his claim and thus on 3-12-1999 a cheque for Rs.one lakh was given to the 2nd defendant and thereafter requested the Ist defendant to settle his account. According to the plaint averments, the plaintiff had explained the the Ist defendant that the total value of the works agreed by him from 16-1-1993 to 30-11-1999, in relation to the joint venture is Rs.27,39,326 (sic) and that the share of profit at the rate of 15% of the bill amount would come to Rs.41,08,985 (sic). It is also stated that the plaintiff had convinced the Ist defendant that he had paid Rs.6 lakhs to Abdul Moosa on 29-10-1999 and a sum of Rs.21,29,782/- through his son Abdul Jebbar on 29-10-1999 in anticipation that he would receive a cheque for Rs.4,50,000/- (sic) relating

to 13 items of work. But according to the averments, the plaintiff received only Rs.41,32,325/-. Thus according to the plaintiff, out of the said amount, his share of the profit will come to Rs.6,90,848/-. But he had paid Rs.10 lakhs on 3-12-1999 to the 2nd defendant as directed by the Ist defendant. Therefore, according to the plaintiff he has actually made an over payment of Rs.2,16,305. Thus according to the plaintiff, the Ist defendant is liable to pay him the balance of his profits to the tune of Rs.21,25,420 including the over payment made before the encashment of the last cheque. It is the further case of the plaintiff that the Ist defendant and his son demanded a sum of Rs.30 lakhs and the same was declined by the plaintiff and such refusal made them furious and as a result of which the Ist defendant induced the 2nd defendant to institute a false suit which is the subject matter of O.S.2/2000. The averments which he took in his written statement in the earlier mentioned suit as stated as plaint averments in this suit especially regarding the forgery with

respect to the above mentioned agreement etc. It is also stated that the Ist defendant is refusing to furnish the account maintained by him in respect of the joint venture with the plaintiff and according to the plaintiff, he is entitled to get the balance of share of profits and therefore he preferred the suit for rendition of account with the Ist defendant and realisation of balance amount from both the defendants.

2. The Ist defendant in the suit did not file any written statement. The 2nd defendant has filed a separate written statement denying all the averments and claims contained in the plant. We are not proposed to state those contentions raised by the 2nd defendant in the written statement. Since the contentions raised in the written statement filed by the 2nd defendant is nothing more or less the same contention that he had raised as the plaintiff in O.S.2/2000 which we have already stated in the foregone paragraph.

3. In this suit on the basis of the rival pleadings of the

parties, the court below had framed 3 issues.

4. During the joint trial of the suits, the evidences were recorded in O.S.2/2000 which consists of the oral testimony of PWs 1 and 2 and DW-1 to DW-3; documentary evidences are Exts.A1 to A23; Exts.B1 to B3 and Exts. X1 and X2.

5. We have carefully perused the judgment of the court below and also the materials and evidence on record. Going by the pleadings and the evidence advanced in support of the pleadings it can be seen that there is no dispute regarding the works undertaken and its completion. However, it appears that the main controversy is with respect to the sharing of profits and regarding the payments and transaction that taken place connected with the works undertaken by them. The real position has to be ascertained on the basis of the factual position involved in the case, that too, on the basis of the supporting evidence and materials. Going by the judgment of the court below, it can be seen that after an elaborate discussion and appreciation of evidence

and materials on record the trial court has come into a factual finding under issue Nos. 1 to 4 in O.S.2/2000 that the plaintiff is entitled to realize an amount of Rs.29,37,325/- from the defendant therein. Similarly in issue Nos. 1 and 2 in O.S.40/2002, the trial court found that there is no evidence by way of documents to show that there was a case for settlement of accounts with the Ist defendant so as to enable the plaintiff therein to have a preliminary decree. Due to total lack of evidence, the court below was constrained to found that there is no joint venture with the Ist defendant and thus accordingly the relief sought for in O.S. 40/2002 was declined and accordingly O.S.2/2000 is decreed allowing the plaintiff therein to realise a sum of Rs.29,37,325/- with interest at 6% per annum from the date of the suit till realization and costs of the suit from the defendant and his assets. The other suit was dismissed.

6. After elaborate discussion of the materials and

evidence on record, the trial court found that there was an agreement between the plaintiff and defendant in O.S.No.2/2000 whereby 13 items of works were to be executed by the plaintiff, in a contract obtained by the defendant from the Irrigation department. Exts.A1 to A 13 are the documents pertaining to those 13 items or work. The total amount of work is Rs.31,32,325/-. According to the defendant, as stated in Ext.A17 reply notice, it is alleged that the actual share of profits for the work is 15% and according to the defendant, the plaintiff was taking undue advantage of clerical mistake in the agreement. But the defendant miserably failed to substantiate the so called “clerical mistake” in Ext.A14 agreement. It is also relevant to note that the plaintiff has specifically pleaded that one copy of Ext.A14 agreement was with the defendant and that allegation was not disputed or denied by the defendant. If the case of the defendant is bona fide one and true, there was opportunity for him to produce the copy of Ext.A14 agreement and to

substantiate the alleged clerical mistake if any in the agreement. Therefore, it is to be held that the plea of clerical mistake in Ext.A14 is baseless. It is also relevant to note that during trial, when the defendant was confronted with the signatures in Ext.A14, he did not deny any of the signatures occurring on the 4 pages of the document. Thus purely on materials and on proved facts and circumstances, the trial court has repelled the claim of the defendant regarding the forgery of the agreement etc. Therefore, the trial court has correctly found that the defendant is bound by the terms of Ext.A14 agreement and accordingly, the suit was decreed in favour of the plaintiff in O.S.2/2000. We find no perversity or illegality in the finding arrived at by the trial court warranting interference by this Court with the judgment and decree passed by the court below.

7. In O.S.No.40/2002, the trial court has found that there was no documentary evidence on the part of the defendant to substantiate the allegation that there was a joint

venture with the Ist defendant in doing the contract work for the period 16-1-1993 to 30-11-1999. In O.S.40/2002 the case of the plaintiff was that he had paid Rs.10 lakhs to the 2nd defendant on 3-12-1999. Thus according to the plaintiff he had made an over payment of Rs.2,16,305/- to the Ist defendant. It is also alleged that the total amount due to the plaintiff from the Ist defendant is Rs.21,25,420/-. In this juncture it is relevant to note that appellant has not produced any document to show the terms of contract regarding the execution of work between the appellant and the respondent. But he simply relied upon Ext.A14 agreement in which, according to him, the share of profit is 15% and not Rs.15,000/- as originally shown in Ext.A14. Thus, all the figures calculated and shown on the basis of 15% profit as claimed by him. There is no evidence to substantiate the same. The appellant has no pleading or case that he had paid off all amounts due to the respondent as per the terms of Ext.A14 agreement and on the basis of the share of profit

forged as Rs.15,000/-. Thus according to the plaintiff, the Ist defendant failed to settle the accounts with him. As pointed out earlier, there was no documentary evidence to substantiate the allegation that there was a joint venture with the Ist defendant in doing the contract work for the period from 16-1-1993 to 30-11-1999. After the appreciation of the evidence on record, the trial court has found that the claim of the plaintiff stated in the plaint does not appear to be coherent . and his claim that his share would come to the tune of Rs.41,08,985/- is found to be incorrect. The court has also found that there is no evidence of any agreement to substantiate the claim of the plaintiff that he is entitled to get 15% of the profits. There is no written agreement. The only agreement produced in the case is Ext.A14 which does not show that the plaintiff in O.S.40/2002 is entitled to get 15% of the profit. After considering the various payments alleged to have been made by the plaintiff in O.s.40/2002 the trial court has found that in the plaint in O.S.40/2002,

Rs. 21,29,782/- is alleged to be paid to the Ist defendant's son and Rs.10 lakhs to the 2nd defendant. All those payments are alleged to be on account of Ext.A14 works. There is no other case for settlement of accounts made out by the plaintiff in this case. It is also found by the trial court that his actual complaint seems to be regrading Ext.A14 agreement only and the amount received thereunder. Thus the trial court found that the relief sought for in O.S.40/2002 are deserved to be granted.

8. From the above discussions and on the basis of the materials available on record, it can be seen that the definite stand taken by the appellant during the trial of both the cases is that no amount is due from him to his opponent. To be more clear, there was no case for the appellant that he had paid the amount to the plaintiff in O.S.2/2000. On the other hand, what was pleaded is that he was entitled to get 15% of the profit out of the works executed. In order to substantiate the above pleadings, what he had attempted to establish

is, that as per the agreement, what was agreed to be paid as commission is 15% and not Rs.15,000/-. But the appellant miserably failed to establish the above pleading. On the other hand, it has been specifically proved against the appellant that he is bound by Ext.A14 agreement and thereby is liable to pay the plaint amount in O.S.2/2000. Even though the appellant had no case that he had paid the amount to the plaintiff in O.S.2/2000, after the closure of the evidence he had produced Exts. X1 and X2 documents. Ext.X2 is the income tax return of the 2nd defendant which would show certain income of the 2nd defendant. But merely because certain amounts are shown in Ext.X2, it cannot be said that the same was from the appellant. The said figures in Ext.X2 can be accrued amount or otherwise. Learned counsel appearing for the respondent pointed out that those documents are produced after the closure of evidence. It is also pointed out by him after inviting our attention to Ext.A23 which is a revised return statement filed by the 2nd

defendant in O.S.40/2002. As per Ext.A23, the contention and claim advanced by the appellant as per Ext.X2 has been negatived. It is also argued by the counsel for the respondent that in the light of the decision reported in **Mohammed Sageer v. Prakash Thomas** (2005 (2) KLT 400) the appellant who was the plaintiff in O.S.40/2002 and defendant in O.S.2/2000 are precluded from adducing any evidence on any fact not pleaded. It is true that neither in the plaint in O.S.40/2002 nor in the written statement in O.S.2/2000 the appellant has taken a plea that he had paid the plaint amount in O.S.2/2000. In the absence of such plea, he cannot adduce evidence and therefore, Exts.X1 and X2 cannot be pressed into service and let in as evidence to substantiate which was not formerly taken. In the above decision in **Mohammed Sageer's** case (cited supra), a Divison Bench of this Court after referring to various decisions of the Apex Court as well as this Court has held:

> .....“It is well-settled that where a claim has been never made in the defence presented, no amount of evidence can be looked into upon a plea which was never put forward. The importance of pleadings cannot be lost sight of. They from the foundation for the trial of the case. Parties let in evidence on the basis of pleadings. If a party is allowed to adduce evidence on matters which are not put forward in the pleadings, the opposite party shall be put to prejudice. Trial of a case shall be a fair trial. Parties shall have a fair contest. Parties shall take the Court into confidence and shall do everything to enable the Court to dispose of the case completely and effectually. It is unfair to put forward contentions on facts, which are not covered by pleadings and evidence and in respect of which the opposite party is put in the dark. Courts would be slow in entertaining such contentions”.

In the present case also, the appellant has not taken such a plea and therefore, Exts.X1 and X2 cannot be looked into and the same will not advance the case of the appellant. Even if Exts.X1 and X2 are considered, as stated earlier, Ext.A23 is sufficient to negate the contention of the appellant on the basis of Exts.X1 and X2.

In the light of the above discussions, we find no reason to interfere with the finding arrived at by the court below and its judgment and decree. Therefore, the above appeals lack merits and accordingly, the same are dismissed.

P.R.RAMAN, JUDGE.

V.K.MOHANAN, JUDGE.

Kvm/